Ang Sing Hock v Prime Credit Leasing Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-41-95
LAMIN PCA, ABU MANSOR AND AHMAD FAIRUZ JJCA
2 JULY 1996

Civil Procedure *— Appeal —Record of Appeal — Application to include evidence tendered in sessions court in Court of Appeal — Evidence not included in appeal record of High Court due to neglect and oversight — Attempt made to refer to the evidence in High Court objected by opposing party — Whether evidence should be allowed to be included in appeal record for purpose of appeal to Court of Appeal — Rules of the Court of Appeal 1994 O 18 rr 4(c) & 6*

The respondent ('the plaintiff') applied for summary judgment against the appellant ('the defendant') in the sessions court below. The sessions court judge, however, held that there were triable issues, and accordingly dismissed the plaintiff's application. The plaintiff appealed to the High Court. It was not disputed that the appeal records prepared by the plaintiff in the High Court did not contain exh A, which was the defendant's application and affidavit filed in the sessions court. In the High Court, an attempt was made by the defendant to refer to exh A, but was objected to by the plaintiff since the exhibit was not in the appeal records. The defendant did not make an issue of the absence of exh A in the appeal records before the judge. The High Court judge allowed the plaintiff's appeal, and the defendant appealed to the Court of Appeal. The defendant applied to have exh A to be included in the appeal before the Court of Appeal. The issue before the Court of Appeal was whether exh A should be allowed to be included in the appeal record for the purpose of an appeal to the Court of Appeal when that evidence, though available, was inadvertently not included in the appeal record of the High Court.

Held, dismissing the application:

(1) The appeal records filed for the purpose of appeal to the Court of Appeal, which included exh A, were not in accordance with O 18 r 4(c) of the Rules of the Court of Appeal 1994 ('the Rules'), which provides, inter alia, that the appellant shall attach to memorandum appeal copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal. Exhibit A was copies of documents in the sessions court not included in the record of appeal for the purpose of the appeal to the High Court, but only referred by the applicant in the High Court under circumstances of strong protest by the respondent that exh A in the sessions court's records was not part of the High Court record that they could be referred to (see pp 364G and 365C).

(2) The applicant, in the filing of exh A, failed to resort to O 18 r 6 of the Rules which sets out the procedure before such filing can take place. Order 18 r 6 provides, inter alia, that a draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who may within 48 hours object to the inclusion or exclusion of any document. The failure of the defendant to resort to this procedure had robbed the plaintiff of the chance to serve his objections within the 48 hours prescribed. This in itself disentitled the defendant to have the order sought (see p 365D–H).

(3) It is trite law that this type of evidence can only be admitted if that evidence was not available to the defendant after exercising due diligence, but exh A was available and was not included in the appeal records of the High Court due to neglect and oversight (see pp 365I and 366A).

[Bahasa Malaysia summary

Penentang ('plaintif') telah memohon untuk penghakiman terus terhadap perayu ('defendan') di mahkamah sesyen. Walau bagaimanapun, hakim mahkamah sesyen memutuskan bahawa terdapat isu yang boleh dibicarakan, lalu menolak permohonan plaintif. Ekoran itu, plaintif merayu kepada Mahkamah Tinggi. Adalah tidak dipertikaikan bahawa rekod rayuan yang disediakan oleh plaintif di Mahkamah Tinggi tidak mengandungi eks A, yang merupakan permohonan dan afidavit defendan yang difailkan di mahkamah sesyen. Di Mahkamah Tinggi, defendan telah cuba merujuk kepada eks A, tetapi telah dibantah oleh penentang kerana ekshibit itu tidak berada dalam rekod rayuan. Defendan tidak menimbulkan isu tentang ketiadaan eks A dalam rekod rayuan di hadapan hakim. Hakim Mahkamah Tinggi membenarkan rayuan plaintif, and defendan merayu kepada Mahkamah Rayuan. Defendan membuat permohonan untuk memasukkan eks A dalam rekod rayuan di hadapan Mahkamah Rayuan. Isu yang harus dipertimbangkan oleh Mahkamah Rayuan ialah sama ada eks A boleh dibenarkan untuk dimasukkan ke dalam rekod rayuan untuk tujuan rayuan kepada Mahkamah Rayuan apabila keterangan itu, walaupun ada, telah tidak dimasukkan di dalam rekod rayuan Mahkamah Tinggi kerana kelalaian.

Diputuskan, menolak permohonan itu:

(1) Rekod rayuan yang difailkan untuk tujuan rayuan kepada Mahkamah Rayuan, yang memasukkan eks A, tidak mematuhi A 18 k 4(c) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah tersebut'), yang memperuntukkan, antara lain, bahawa perayu hendaklah mengepilkan kepada memorandum rayuan salinan-salinan semua afidavit yang dibaca dan semua dokumen-dokumen yang dikemukakan sebagai bukti di Mahkamah Tinggi

selagi ianya material kepada tujuan-tujuan rayuan. Ekshibit A adalah salinan-salinan dokumen di mahkamah sesyen yang tidak dimasukkan dalam rekod rayuan untuk tujuan rayuan kepada Mahkamah Tinggi, tetapi hanya dirujuk oleh pemohon di Mahkamah Tinggi di bawah keadaan-keadaan bantahan yang kukuh daripada penentang bahawa eks A dalam rekod mahkamah sesyen bukan sebahagian daripada rekod Mahkamah Tinggi yang boleh dibuat rujukan (lihat ms 364G dan 365C).

(2) Pemohon, dalam memfailkan eks A, gagal untuk mematuhi A 18 k 6 Kaedah-Kaedah tersebut yang menyatakan prosedur sebelum pemfailan boleh dibuat. Aturan 18 k 6 memperuntukkan, antara lain, bahawa deraf indeks dokumen-dokumen yang hendak dimasukkan dalam rekod rayuan hendaklah disampaikan oleh peguam perayu kepada peguam penentang yang boleh dalam masa 48 jam membantah terhadap pemasukan atau ketakmasukan apa-apa dokumen. Kegagalan defendan untuk mematuhi prosedur ini telah tidak memberi peluang kepada plaintif untuk menyampaikan bantahannya dalam masa 48 jam yang ditetapkan. Ini dengan sendirinya tidak memberi hak kepada defendan untuk mendapat perintah seperti yang dikehendaki (lihat ms 365D–H).

(3) Adalah undang-undang mantap bahawa keterangan jenis ini hanya boleh diterima jika keterangan itu tidak didapati oleh defendan setelah melaksanakan ketekunan yang sepatutnya, tetapi eks A ini sedia ada dan tidak dimasukkan di dalam rekod rayuan Mahkamah Tinggi kerana kecuaian dan kealpaan (lihat ms 365I dan 366A).]

[*Editorial Note*: The appellant/defendant has applied for leave to appeal to the Federal Court.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Legislation referred to

Rules of the Court of Appeal 1994 O 18 rr 4(c), 6

Appeal from: Civil Appeal No R2–12–218–94 (High Court, Kuala Lumpur)

Mazridzuan bin Mohamad (*Jargit & Partners*) for the appellant/defendant.

Paul Kwong Kum Wah (*Azman Davidson & Co*) for the respondent/plaintiff.

Cur Adv Vult A

Abu Mansor JCA (delivering the judgment of the court): This is our decision dismissing the motion of the appellant/applicant encl 27B for an order that exh A (the applicant's application and affidavit filed in the sessions court, Summons No 52–6298–1992) ('the sessions court case') B be received as evidence by the Court of Appeal. After hearing arguments on 28 May 1996, we unanimously dismissed this application. After having made the order in encl 27B, as a consequence, we granted the respondent's application in encl 27A, granting the respondent's application which had the effect of excluding exh A from the record of appeal.

As can be gathered, the facts of this case are as follows. The appellant/ C applicant in the present appeal was a defendant in the application for a summary judgment before the sessions court case. The learned sessions court judge held that there were triable issues and dismissed the plaintiff's application. The plaintiff appealed to the High Court. It is an undisputed fact that the appeal records prepared by the plaintiff/appellant in the High D Court did not contain exh A. At the High Court, this present applicant did not make an issue of the absence of exh A in the appeal records before the learned judge. The applicant conceded they overlooked. The learned judge of the High Court allowed the appeal and the applicant/defendant applied to have exh A, which was objected to in the High Court, to be included in the appeal before the Court of Appeal. After hearing arguments, E we dismissed the applicant's application as stated above.

The central issue before this court was whether we should allow this exh A evidence to be included in the appeal record for the purpose of an appeal to the Court of Appeal when that evidence, though available, was inadvertently not included in the appeal record of the High Court. An F attempt was made by the defendant to refer to them but was objected to by the appellant in the High Court since the exhibit was not before it.

In dismissing the applicant's application, we upheld the respondent's objection after finding that the objections were valid ones.

Firstly, when the appeal records for the purpose of appeal to the G Court of Appeal were filed, they included exh A. They were not in accordance with O 18 r 4(c) of the Rules of the Court of Appeal 1994 ('the Rules'), which provides:

> 18 (1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, H the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.
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> (2) —
>
> (3) —
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> (4) The appellant shall attach to such memorandum copies of the I proceedings in the High Court, including —

A

(a) —

(b) —

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

B

(d) —

(e) —

As stated, what have been included in exh A are copies of documents in the sessions court not sought to be included by the applicant in the record of appeal for the purpose of the appeal to the High Court, but only referred by the respondent/defendant in the High Court appeal under circumstances of strong protest by the appellant that exh A found in the sessions court's records in was not part of the High Court record that they could be referred to.

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Secondly, and most relevant, the applicant, in the filing of exh A presently, failed to resort to O 18 r 6 of the Rules which sets out the procedure before such filing can take place. Order 18 r 6 provides:

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

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The failure of this applicant to resort to this procedure has robbed the respondent of the chance to serve his objections within the 48 hours prescribed. This in itself, in our view, disentitled the applicant to have the order sought for.

I

Lastly, it has many times been decided that it is trite law that this type of evidence can only be admitted if that evidence was not available to the applicant after exercising due diligence, but this exh A was available

and was not included in the appeal records of the High Court due to neglect and oversight.

Having heard arguments and considered this application fully, we were of the view we should dismiss this application with costs to the respondent. As a consequence of our decision in encl 27, the respondent succeeds in his application in encl 27A, and we had to allow the respondent's application in encl 27A with costs.

Application dismissed.

Reported by Jafisah Jaafar